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TABLE OF CASES

Supreme Court of the United States.

OCTOBER TERM 1922

No. 5

WILLIAM R. BEGG and ARTHUR C. HUME, Receivers of the MANHATTAN and QUEENS TRACTION CORPORATION,
Appellants,

vs.

THE CITY OF NEW YORK,
Appellee.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

(NOTE: Throughout this brief the italics are ours. Throughout this brief we will for convenience refer to the Appellee as "the City".)

Reply Brief of Appellants.

We will discuss and oppose (*infra*, pp. 10-24) the City's *motion to dismiss* the appeal (City's Brief, pp. 41-44) after we have indicated (*infra*, pp. 2-10) what matters are in controversy on this appeal between the parties.

The *matters* in controversy on this appeal can be clarified and reduced to simple terms by the following tabulation:

The Appellants maintain—

1. That the Circuit Court of Appeals was without jurisdiction because the order appealed from was interlocutory and not final, and the appeal was not taken in time;

(this controversy in itself gives this Court jurisdiction of this appeal—*infra*, pp. 11-15.)

2. That the Circuit Court of Appeals erred upon the merits, in that—

(a) the Traction Company was not required to extend its tracks until the City took title to the streets involved and had regulated and graded them; and this the City did not do;

(b) the Traction Company had not failed to perform its contract obligation; the right to forfeit did not exist; a case was presented for judicial interference;

(c) the Circuit Court of Appeals misconstrued the contract; the forfeiture clause upon which the City relied was not applicable; the franchise was not automatically forfeited;

(d) the City waived any claim to an automatic forfeiture;

(e) the Board of Estimate and Apportionment in passing the contemplated resolution of forfeiture would not be exercising a legislative power;

(f) the Board had no power to forfeit either the grant or the railroad property for failure to construct an extension;

(g) the forfeiture of a franchise can only take place after an adjudication, in litigation between The People of the State of New York and the grantee of the franchise;

(h) the District Court was not interfering with a sovereign right or a legislative power in issuing its injunction;

(i) equity should relieve the Receivers; they had legal excuse for non-compliance with the City's demand;

(j) the District Court had the power which it exercised, and the exercise was proper.

3. This Court should either vacate the judgment of the Circuit Court of Appeals for want of jurisdiction or reverse its judgment for error and reinstate the order of the District Court.

To meet these contentions the City, in its brief, maintains:

1. That this court is without jurisdiction;
2. the Circuit Court of Appeals had jurisdiction;
3. the Receivers could not proceed by petition;
4. the District Court had no equitable right to enjoin the Board, whose proposed action was an exercise of legislative power;
5. the City had the right to forfeit by Resolution of the Board;
6. the Receivers presented no legal excuse;
7. the entire franchise automatically ceased;
8. the Traction Company was estopped to deny the validity of the conditions imposed by their contract;
9. the title to the streets involved was in the City and they had been regulated and graded;

10. the surface structures did not prevent the extension;
11. the Circuit Court of Appeals properly construed the specific forfeiture clause as applicable;
12. the Board had power to insert it in the contract;
13. the Traction Company was estopped to deny the power;
14. Court proceedings were not required to annul the franchise;
15. the City is not estopped;
16. equity should not grant relief;
17. the forfeiture should extend to all of the tracks and equipment, constructed pursuand to the contract, in the streets and avenues of the City.

The City is not an Appellant, therefore, it is not in a position to complain of the very limited modicum of relief which the Circuit Court of Appeals did reserve to the Receivers by the following provisions of its judgment now appealed from:

(Transcript printed on p. 150)

"without prejudice, however, to the right of the Receivers to renew their application *after* the adoption of the proposed resolution by the Board of Estimate and Apportionment.

if the Receivers then have reason to believe that

The City of New York is proposing to take into its possession

any of the *visible* and *tangible* property which has come into their hands as Receivers

and which they are advised the City of New York *is not entitled* to take from their possession, *by virtue of the resolution* aforesaid."

In other words, notwithstanding the action of the Circuit Court of Appeals, the Receivers still have the remaining right to apply to the Court to ascertain judicially whether the objectionable resolution *after* its passage, *entitles* the City to take *visible* and *tangible* property from their possession, *if* they can believe and *if* they are advised, that even then the City is not entitled to it;

but their belief and all advice will not entitle them to apply to any Court to protect them, for the benefit of all parties in interest, in the enjoyment of the right to operate the railroad, of which the *visible* and tangible property in their possession is a mere minor incident.

The City may, under the judgment of the Circuit Court of Appeals kill the enterprise, but as for the possession of the trinkets of the corpse, if the Receivers believe and they can get anybody to advise them, that these do not go with the life, then they can apply to a Court to determine whether they can retain these *things,* though the "railroad" is gone.

The most dangerous and astonishing proposition involved in the City's contention is

> that Receivers of a railroad operating under a franchise are not entitled to apply to the Court of their appointment to adjudge whether a municipality may forfeit the franchise to use streets;
>
> and that the Court is powerless to enjoin the municipality from asserting the right claimed to be reserved to it under a contract with the railroad company and from so exercising the right asserted as to destroy the right to use the streets,
>
> without first, in the orderly course of justice, affording the Receivers and the Court an opportunity to ascertain whether the muni-

> cipality actually has the asserted right under the contract, and under the circumstances of the case should be permitted to exercise it.

The essence of the City's position on this proposition is

> that the municipality is immune from judicial inquiry; and
> that its action upon its asserted rights can not be restrained pending inquiry, and in that position the City is sustained by the Circuit Court of Appeals.

There is, of course, the further proposition contended for by the City that, upon the inquiry actually made in this case, it was demonstrated that the City's position was right on the law and the facts, and no relief should have been granted;

but that is a minor proposition, compared with the primary one, that where a municipality asserts the right to do the act complained of, its right cannot be judicially inquired into beyond the question, does it assert the right? For if it does, it must be permitted to proceed without judicial interference or investigation, even though the Court has assumed for the benefit of all interests to conserve the property right involved.

The finality of the injunction order:

The City also, in effect, contends that

> when a municipality asserts that its proposed activity is beyond judicial interference; and the Court says, in effect, we'll see about that; we'll enjoin you until you demonstrate your right to the Court; that the very act of the Court in assuming jurisdiction, and enjoining the municipal act

> until it can be further judicially inquired into, is itself so dispositive of rights, that it becomes a final adjudication for the purposes of appeal. In short, that when a municipal body asserts that it is not amenable to judicial interference with the exercise of an asserted right, such interference is a final act, in the judicial sense, though it is (as it was in this case)
>
> > "*without prejudice* to any further or other application to this Court for the enforcement of any claim or right of the City of New York as to said matters." (Transcript, p. 125—principal brief, pp. 31, 32).

Compressed to its essential elements, this proposition amounts to the claim—

> that if one asserts his freedom from judicial interference;
> and the Court enjoins him without prejudice to his application to the Court to enforce his claim;

the mere fact that the Court determines that he is wrong in his assertion of a legal principle that he is not amenable to judicial interference, is a "final" disposition of his rights, without regard to the fact that the Court says, You may demonstrate to the Court what your right is;

> or stated another way—the City's position is that: the overruling of a plea to the jurisdiction is a "final" disposition, though the Court merely says—we have jurisdiction; now, when you wish to go ahead, we will proceed to hear and determine, on your application, what your rights are. No, says the recalcitrant. I denied your power over me; that is a final disposition of my rights.

We submit that one cannot, in the federal jurisprudence secure a "final" decree, by merely denying the power of the Court to adjudge his right; that it is not a "final" decree against him to adjudge that the Court has the power to adjudge his asserted right and will accord to him the privilege of demonstrating in the Court the right which he asserts to be free from judicial interference. There must be some final disposition of the ultimate right and not merely of the contention that such ultimate right is free from judicial interference, before the Court can be said to render a *final* decree.

If the injunction order was not a *final* decree, then the Circuit Court of Appeals was without jurisdiction; and if this Court has jurisdiction, the judgment of the Circuit Court of Appeals must be vacated, and the appeal to that Court dismissed; the original order of the District Court will then be automatically reinstated.

See the practice thus established in

> *The Carlo Poma,* 255 U. S. 219;
> *Four hundred and forty-three Cans of Egg Product* vs. *U. S.,* 226 U. S. 172.

We submit that we have established both by the foregoing argument and by the demonstration in our principal brief, pp. 27-44 that the order of the District Court was not final and that the *Circuit Court of Appeals was without jurisdiction of the appeal.*

In our principal brief (pp. 36-41) we have sufficiently distinguished the present case from *Odell* vs. *Batterman Co.,* 223 Fed. R. 292, relied on as a precedent for regarding this as a *final* order by showing—

> that the question of the time to appeal was not there involved; and that the order there did not contain the temporary and saving clauses which this order did.

That order, by preserving the Receivers' right of occupation until the Receivership was terminated and against the claim of the landlord to immediate possession was held to be a final denial of the right to immediate possession, from which the landlord might appeal as from a final order. It was not an injunction order from which an appeal might have been taken in thirty days, but a denial of the landlord's application for leave to sue for immediate possession, except under such conditions as to the Receivers continued occupation, that immediate possession asserted as a right became an impossibility. As this right was finally denied, the Court properly held that it could be appealed from as a final order. But it would have been different altogether in substance and effect, if the rights of the Receiver had not been finally saved, and the leave to apply as against the Receiver also (as here) had been reserved to the landlord.

The principle so familiar in patent cases that even though a *permanent injunction* be granted prior to final hearing the order granting it is not final but interlocutory should be applied in this case.

Baker v. *Walter Baker & Co. Ltd.*, 83 Fed. 3 (Cert. den. 168 U. S. 712)

Bissell Carpet Sweeper Co. v. *Goshen Sweeper Co.*, 72 Fed. 545

Star Brass Works v. *General Electric Co.*, 129 Fed. 102

Richmond v. *Atwood*, 52 Fed. 10 and cases cited, pages 12-19 inclusive.

In *Westinghouse &c. Co.* vs. *Richmond &c. Co.*, 267 Fed. R. 490 (Chatfield D. J., E. D. of N. Y.) though the judge felt constrained to acquiesce in the decision of the Circuit Court of Appeals in this present pending case, he indicated

that it was, in his opinion, to be limited to the action of the Board of Estimate,

that he questioned whether it properly extended to every executive act of the Board, and

that an injunction might, nevertheless, run against its enforcement by interference with the possession of the Receiver. The one relief is not necessarily involved in the other.

The Court might conclude it could not enjoin the passage of the resolution by the Board, without being deprived of the Power to enjoin others from enforcing it.

The order of the District Court in the instant case (Transcript, p. 126) had this additional aspect, it did enjoin officers of the City from taking steps to enforce the resolution (Transcript, pp. 125-126); and in reversing this portion of the order, the Circuit Court of Appeals erred, because the merits did not require that disposition of the controversy.

We have deemed it advisable to outline these aspects of the present controversy, before proceeding to demonstrate that the City's *motion to dismiss the appeal should be denied.*

I.

This Court has jurisdiction of this appeal; and the City's motion to dismiss the appeal should be denied.

The City incorporates in its brief a motion to dismiss this appeal (pp. 41-44).

The motion is not well grounded and should be denied.

It is possible that even the jurisdiction of the main bill, though there was a diversity of citizenship between the parties thereto, was dependent upon and ancillary to the action at law previously

instituted in the same Court between the same parties;

Minnesota Co. vs. *St. Paul Co.*, 2 Wall. 609, 632, 633— for this main bill was a bill (Transcript, p. 81) to enforce in equity a judgment at law for $1,158,506.84 previously recovered; and it does not affirmatively appear upon what the jurisdiction of the action at law was founded. Unless it was founded upon some basis of jurisdiction not disclosed in the record, this Court would have jurisdiction of this appeal.

See *Eichel* vs. *United States Fidelity and Guaranty Co.*, 245 U. S. 102.

The City, however, relies upon the fact (p. 43) that the Receivers' application was in a suit between citizens of different states, and, therefore, contends that the Receivers' petition was ancillary to the main suit, was dependent, and (though its brief does not cite Judicial Code S. 128), it apparently relies upon this section as defeating the present jurisdiction.

On the other hand, we found the present jurisdiction upon the principles of *Ohio Railroad Commission* vs. *Worthington,* 225 U. S. 101.

In the last mentioned case, a bill was filed in a District Court, of which the sole ground of jurisdiction was diversity of citizenship, and thereupon a Receiver was appointed. Then by authority of the Court, the Receiver filed in the same Court a bill against the Ohio Railroad Commission on the double ground that its order fixing a rate was unsupported by evidence and further that it was a violation of the Constitution of the United States in that the Commission was without power, because of the Commerce Clause of the Constitution, and that the order deprived the owners of property without due process of law and denied them the equal protection of the law and took their property without compensation.

This Court (opinion by Day, J., p. 104) considered that jurisdiction was invoked

> *not only* because the case was ancillary to the receivership suit, which depended upon diverse citizenship,
>
> *but* upon grounds which involved alleged infractions of the Federal Constitution and rights secured thereby;
>
> and though a direct appeal might have been taken to this Court, the Court of Appeals also had jurisdiction to entertain an appeal.

So also here, upon examination of the record (Transcript, p. 6) we find that though the Receivers were appointed in a judgment creditors' suit in which there was diversity of citizenship (Transcript, p. 81) to enforce a judgment previously recovered in the same Court, of which it is alleged that the Court had jurisdiction (without disclosing the ground of that jurisdiction, *supra*, p. 10), still, nevertheless, when the Receivers invoked the aid of the Court of their appointment to protect the property and rights in their care (the Court having exclusive jurisdiction by reason of such possession and control—*Wabash R. R. Co.* vs. *Adelbert College*, 208 U. S. 38; *Murphy* vs. *John Hofman Co.*, 211 U. S. 562; *Krippendorf* vs. *Hyde*, 110 U. S. 276), they, the Receivers, invoked that judicial aid

> not because of any diversity of citizenship, but because they had been appointed by the Court as Receivers of the franchises, property and assets;
>
> their possession was that of the Court (*ibid*);
>
> they had entered into possession and were operating the railway in accordance with the order appointing them;
>
> and that the City contemplated and was threatening inequitable and unjust conduct (Transcript, p. 17);

> that the jurisdiction of its Board of Estimate and Apportionment was doubtful;
>
> that its threatened action was in violation of the *Fifth and Fourteenth Amendments* of the Constitution of the United States,
>
> and that it would deprive the Railroad Corporation of its property *without due process of law,* and take its *private* property for public use *without just compensation;*
>
> other grounds are also asserted (Transcript, p. 18).

Under the decision in the case of *Railroad Commission of Ohio* vs. *Worthington,* 225 U. S. 101, 104, this constitutes invoking the jurisdiction

> not only because it is ancillary to the receivership suit,
>
> but also upon grounds which involve alleged infractions of the Federal Constitution and rights secured thereby. (p. 104).

As a consequence, this is *not* one of the cases in which the judgment of the Circuit Court of Appeals is made final (*ibid,* p. 105); and there is a right of review in this Court, the amount in controversy exceeding the jurisdictional amount (at least $300,000) (Transcript, p. 15)

> "The case is therefore one not made final in the Circuit Court of Appeals, and the appeal to this Court was properly allowed."
>
> *Railroad Commission of Ohio* vs. *Worthington,* 225 U. S. at p. 105.

This is sufficient to demonstrate that *this Court has jurisdiction* of the present appeal and should proceed to examine the merits.

As a further illustration, we cite *Vicksburg* vs. *Henson,* 231 U. S. 259, 267, where, though jurisdiction of a bill by Receivers was based on a

diversity of citizenship, an amended and supplemental bill added to the original allegations of a violation of contract rights, an allegation of a violation of constitutional rights, and this Court determined that the decree of the Circuit Court of Appeals was not final, and retained jurisdiction and reviewed the case on the merits, and not merely on whether there was a constitutional question.

In general where there are two grounds of jurisdiction in the Trial Court, one, in which the judgment of Circuit Court of Appeals would be final, and the other a ground as to which its judgment is not made final, the existence of the latter ground is sufficient to preserve the right of appeal to this Court.

> *MacFadden* vs. *United States,* 213 U. S. 288, 296 discussing
> *Spreckels Sugar Refining Co.* vs. *McClain,* 192 U. S. 397;
> *Christianson* vs. *King County,* 239 U. S. 356.

The City appears to contend (Brief, pp. 41-44) that upon the appeal, the Court can only examine whether there is a federal question; it can in fact examine the entire record, and correct every judicial error.

The jurisdiction of this Court exists because diversity of citizenship is not the sole ground of jurisdiction of the *case.* Even the main suit was itself a dependent suit to enforce a judgment at law already recovered in the Court (Bill, Transcript, p. 18), and the ground of jurisdiction of the suit at law does not appear;

> having jurisdiction this Court is not limited to any specific grounds of review *Siler* vs. *Louisville & Nashville R. R. Co.,* 213 U. S. 175, 191.

The ground of jurisdiction here exists if the case does not fall into an excepted category; of all other categories, this Court has jurisdiction. If the present *case* is not in the excepted category, as it is not, the questions which may be reviewed are without limit; they are as broad as the possibilities of judicial error. (Principal Brief, pp. 47-48).

This is not a direct appeal from the District Court, and, therefore, the Court is not limited to constitutional questions (Judicial Code S. 238). On this appeal, this Court can decide the whole matter in controversy (Judicial Code S. 241) (Principal Brief, pp. 47-48).

> *Siler* vs. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191;
> *Greene* vs. *Louis. & Interurban R. R. Co.*, 244 U. S. 499, 508.

And it can determine that the Circuit Court of Appeals had no jurisdiction,

> *Aztec Min. Co.* vs. *Ripley*, 151 U. S., 79

for, if it had no jurisdiction, its judgment could not be final under Judicial Code S. 128.

> *Four hundred and forty-three Cans of Egg Product* vs. *U. S.*, 226 U. S. 172.

In fact, the jurisdiction of the Circuit Court of Appeals is the first consideration in this Court.

> *Southern Railway Company* v. *Postal Telegraph Cable Company*, 179 U. S. 641.

The assertion in the Receivers' petition of the constitutional rights invaded, was not merely colorable, a real question of such invasion was presented by the facts alleged. It is not frivolous or without support in reason. It presented an actual controversy upon that point of law.

The alleged dilemma suggested on p. 41 of the City's Brief does not exist. The jurisdiction of this Court to review exists if the question was so presented to the District Court by the Receivers' petition as to show that the jurisdiction of that Court was invoked upon some other ground than diversity of citizenship; it is not necessary that it shall then be demonstrated that the ground asserted actually exists; it is sufficient that it is rationally arguable and not merely colorable; that establishes the basis of jurisdiction; but having the jurisdiction, the Court has the powers of a Court of Equity, and may make equitable disposition of the controversy without necessarily determining that the inequitable conduct is also unconstitutional. Its unconstitutionality may be the matter in controversy without being the determining factor in the Court's disposition of the controversy, in order to sustain its jurisdiction. Indeed this Court, having acquired jurisdiction because of the allegation of a violation of constitutional rights will not declare the act unconstitutional if it can find in the record any other ground for adjudication which will make the determination of the constitutional question unnecessary. *Siler* vs. *Louisville & Nashville P. R. Co.*, 213 U. S. 175, at p. 193. In this case, the jurisdiction arises out of the facts alleged; the relief granted depends upon the facts proven, but the failure to prove the violation of constitutional rights, if any other violation of rights is shown, does not defeat the jurisdiction or prevent the Court from granting relief for such right as may be violated. So, therefore, the City's argument (pp. 41-44) that if the proposed act was legislative, then this Court is without jurisdiction is inconsequential. The conclusion does not follow from the assumption.

While Art. V of the Amendments to the Constitution prohibits federal action, and, therefore,

does not apply to the City of New York (and we cannot understand the reference to it in the Receivers' petition, p. 18), still Art. XIV of the Amendments *is* applicable, and the Receivers' petition specifies a violation of that, in that a municipal creature of the State of New York seeks to deprive a person of property without due process of law.

Such violation of constitutional rights is not confined to State *Legislation*, it covers action by other State functionaries.

> *Greene* vs. *Louisville Interurban R. R. Co.*, 244 U. S. 507;
> *Reagan* vs. *Farmers Loan & Trust Co.*, 154 U. S. 362, 390;
> *Royal Baking Powder Co.* vs. *Emerson*, 270 Fed. R. 429 (C. C. A. 8th Circuit).

As the asserted ground of violation of constitutional rights was deprivation of property without due process of law (including the taking of property without just compensation—*Chicago, Burlington &c. R. R.* vs. *Chicago*, 166 U. S. 266), the argument of the City's Brief (pp. 42-43) relating to the impairment of contracts, does not meet our point.

Nor is it every act legislative in form which is legislation in fact. If it is unconstitutional it is not law.

> *Hurtado* vs. *California*, 110 U. S. 516;
> *Loan Association* vs. *Topeka*, 20 Wall 655.

Hence, when the City by the forfeiture resolution threatened *to transfer the property* from the Traction Corporation to the City without proceedings at law or in equity, it was not performing a legislative act. (Trans., p. 37.)

IT MAKES NO DIFFERENCE THAT THE RECEIVERS PROCEEDED BY PETITION AND ORDER TO SHOW CAUSE, INSTEAD OF BY BILL AND SUBPOENA THEREON.

It is the character of the jurisdiction invoked in the District Court and the timeliness of the appeal to the Circuit Court of Appeals which determine the right of review in this Court and its extent and the finality of the judgment in the Circuit Court of Appeals; it is not the method pursued to invoke the jurisdiction.

A dependent bill, of which the Court would not have jurisdiction except for its jurisdiction of the main bill, is no less dependent than a petition in the same cause, yet

In *Railroad Commission of Ohio* vs. *Worthington*, 225 U. S. 101 (*supra*, pp. 11, 13), this Court maintained its jurisdiction of an appeal from a decree entered upon a dependent bill filed by a Receiver in the Court of his appointment by authority of the Court against the Commission, which was not a party to the main suit, though the jurisdiction of the main suit was based solely upon a diversity of citizenship. The refusal to dismiss the appeal, as we have already shown (*supra*, p. 11), was based upon the fact that the case made by the dependent bill invoked the jurisdiction not only because it was ancillary to the main suit, but also upon ground (as here) which involved alleged infractions of the Federal Constitution and rights secured thereby.

Does it make any difference in the jurisdiction of this Court, that the Receivers proceeded summarily by petition, instead of more formally by dependent bill?

It certainly does not, if the appeal to the Circuit Court of Appeals was not timely; for then

as it had *no* jurisdiction, its judgment could not be final (*supra*, p. 15).

But, if the appeal to the Circuit Court of Appeals was timely, would the jurisdiction of this Court be defeated because the Receivers proceeded against the City on petition instead of by bill? The question should, we submit, suggest its own answer, in the negative; because the character of the jurisdiction invoked does not, in a case like this, vary with the method of approach, provided the parties are the same under either method of approach, the right asserted is the same, the grounds of invocation are the same, and the nature of the relief sought is the same.

The case last cited does not determine that there is this difference of jurisdictional effect between the petition and bill; and such a mere question of practice cannot reasonably be assumed to have been within the contemplation of Congress when it fixed the finality of a judgment of the Circuit Court of Appeals. Congress certainly did not distinguish, or intend to distinguish between a petition and a dependent bill. It said (Judicial Code, S. 128):

> "the judgments and decrees of the Circuit Court of Appeals shall be final in all *cases* in which the *jurisdiction* is dependent entirely upon the opposite parties to the suit or *controversy* being . . . citizens of different states."

The jurisdiction of this *controversy* was not dependent upon its opposite parties being citizens of different states; it was (in the language of the case cited) dependent upon the violation of rights secured by the Constitution of the United States, and (on the theory of cases cited *supra*, p. 12) the fact that when the District Court took possession

of the railroad through its Receivers, it became the Court of *exclusive* jurisdiction to determine all controversies in respect to such property and regardless of the amount involved.

After that, no matter how the Receivers sought the protection of the Court against one who sought to defeat their possession and operation, if they alleged a violation of constitutional rights, the jurisdiction thus invoked though ancillary to the main dispute, was not dependent upon the controversy being between citizens of different states, but dependent upon the allegation of a purpose to deprive the Court's Receivers of possession and control by the use of unconstitutional means.

If the Receivers had contemplated an independent plenary suit, what would have been the proper Court? It would have been a suit of a civil nature in equity of the jurisdictional amount arising under the Constitution of the United States and, therefore, within the general jurisdiction of the District Courts (Judicial Code, S. 24, subd. 1). The Court of this District would have been the proper district (Judicial Code, S. 51). It would have been the exclusive district under the principles of cases already cited (*supra*, p. 12). No different allegations would have been necessary; the applicable principles of constitutional law would have been the same. Under the Constitution Art. 3, S. 2, such a *controversy* is within the judicial power of the United States because it arises under the Constitution.

The Court would not be deprived of jurisdiction on the constitutional ground because other grounds were also alleged.

Independent School District vs. *Rew*, (C. C. A.—8th Circuit) 111 Fed. R. 1, 49 C. C. A. 198, 55 L. R. A. 364.

Siler vs. *Louisville & Nashville R. R. Co.*, 213 U. S. 175.
Osborn vs. *Bank of United States*, 9 Wheat. 738, 819, 820, 821.
New Orleans &c. R. Co. vs. *Mississippi*, 102 U. S. 135, 141.

The term "*suits*" applies to *any* proceedings in a Court of Justice by which an individual pursues a remedy which the law affords.

In re Silvies River, 199 Fed. R. 495 (D. C., D. Ore.).
U. S. vs. *Block* 121, 3 Biss. 208.
In re Stutsman County (C. C. N. D.), 88 Fed. 337.
Cohens vs. *Virginia*, 6 Wheat. 264, 407.
Weston vs. *Charleston*, 2 Pet. 449, 464.
Ex parte Milligan, 4 Wall 2, 112.
Upshur County vs. *Rich.*, 135 U. S. 467, 474.

In law language a suit is the prosecution of some demand in a Court of Justice.

Cohens vs. *Virginia*, 6 Wheat., at p. 407.

A *controversy* is involved in a suit whenever any property or claim of the parties capable of pecuniary estimate is the subject of litigation, and is presented by the pleadings for judicial determination.

Gaines vs. *Fuentes*, 92 U. S. 10, 20.
Mississippi &c Boom Co. vs. *Patterson*, 98 U. S. 403.

And where constitutional rights are violated the citizenship of the parties is immaterial.

Cohens vs. *Virginia*, 6 Wheat., at p. 393.
Pope vs. *Louisville &c. R. Co.*, 173 U. S. 573, 577.

Doolan vs. *Carr,* 125 U. S. 618, 620.
Walla Walla vs. *Walla Walla Water Co.,* 172 U. S. 1.
Ames vs. *Kansas,* 111 U. S. 449, 470.

Neither the nature of the *controversy* nor the character of the jurisdiction invoked was varied by the fact that the Receivers proceeded by petition, nor that the petition was entitled in the main cause. Its title was merely for convenience. Its character is to be determined by its allegations and the relief sought.

The Circuit Court of Appeals properly concluded (Opinion, Transcript, p. 143) that the Receiver might proceed by petition, that its substance was really ancillary to the main action, that an ancillary bill could have been filed, that the City could be as fully protected as in a separate suit, and that the form of procedure was in the discretion of the District Court, citing

City of Shelbyville, Ky. vs. *Glover,* 184 Fed. R. 234; (C. C. A., 6th Circuit).
Pell vs. *McCabe,* 256 Fed. R. 512, 515; (C. C. A., 2d Circuit).
Hume vs. *City of New York,* 255 Fed. R. 488; (C. C. A., 2d Circuit).

The Receivers having actually entered into possession of the property and occupied the streets and operated the railroad, and the threatened action of the City being prospective, the Receivers' procedure upon petition was the proper course.

2 Street—Federal Equity Procedure, p. 1500.

But whether it was proper or not, the City answered the petition in detail and on the merits

(Transcript, p. 87), and thereby waived any objection as to the method of procedure.

Horn vs. *Pere Marquette R. Co.*, 151 Fed. R. at p. 629
(Lurton, J., E. D. Mich.).

A petition is in the nature of a pleading, and is the proper method of proceeding by one who is not a party to the cause, concerning property impounded or seized under any process of the Court.

2 Street, Federal Equity Practice, ss. 1293, 1294.

It is the Receivers' option whether to proceed by petition or by bill against a stranger to the suit.

2 Street, Federal Equity Practice, s. 2600, p. 1502.

The Receivers were not parties to the cause, and the property in the streets had been impounded under the order appointing the Receivers; the Receivers were proceeding to protect that property actually in their possession, and not to procure something which they did not have; the franchise was as much property as the things capable of manual possession.

People vs. *O'Brien*, 111 N. Y. 1.

In such case, it is proper that the Receivers proceed by petition.

2 Street, Federal Equity Practice, S. 1296.

But, that does not nullify the contention that the jurisdiction invoked by the petition is the same

jurisdiction which would be invoked by bill filed in the same Court against the same party in respect to the same subject matter and with the same allegations respecting the invasion of constitutional rights.

Examples of cases in which the Receiver proceeded by petition to enjoin persons not parties to the suit from interfering with his possession are:

Lake Shore & Michigan So. Ry. Co. vs. *Felton,* 103 Fed. R. 227 (U. S. C. C. A., 6th Circuit) citing and discussing cases (p. 229).

Bibber-White Co. vs. *White River & E. R. Co.,* 107 Fed. R. 176 (C. C. Dist. Vermont, Wheeler, J.).

both citing

Ex parte Tyler, 149 U. S. 164.

In the *Bibber-White* case, the practice was approved even where the Receiver was out of possession of the property sought, but was entitled to it.

In *Krippendorf* vs. *Hyde,* 110 U. S. at p. 287, it was indicated that where one (a stranger to the suit) seeks relief in respect to property in the custody of the Court in a suit in equity, the form of the proceeding is to be determined by the circumstances of the case, and may be by petition or dependent bill.

Blair v. *City of Chicago,* 201 U. S. 400, is cited on page 53 of the City's brief as tending to show that the receivers should have proceeded by ancillary bill rather than by petition. Blair *v.* City of New York does not decide that question because it was not before the court, but the decision is of value to us on another branch of the case. The following is found in the opinion of Mr. Justice Day:

"While it may be that there would have been no interference on the part of the city with the property while it was in the hands of the court's receivers, still the record shows that the city strenuously contested the asserted rights of the corporations to the franchise to use the streets of the city for ninety-nine years, the term claimed to have been granted to them by the act of February, 1865. It was the claim of the city that as to many of the ordinances granting rights in a number of the streets, the right to the use and occupancy of them would expire July 30, 1903. The city had asserted in a number of ways its purpose to treat the rights of the companies and whatever franchises they had as terminated at that date. It declared its purpose to resume possession of the streets and resort to all legal means to protect its rights against what were deemed the unfounded claims of the companies as to the extended franchises. *Without going into further detail upon this branch of the case, we think that the attitude and claims of the city cast a cloud upon the title to this property which was in the hands of the receivers to be administered under the orders of the court, and that in such case the receivers may, with the authority of the court, proceed by ancillary bill to protect the jurisdiction and right to administer the property,* and to determine the validity of the claims of the parties which cast a cloud upon the franchises and rights claimed by the companies and the receivers, and *that in such case it was proper to grant an injunction until the rights of the parties could be determined.* Detroit *v.* Detroit Citizens' Street Railway Co., 184 U. S. 368; In re Tyler, 149 U. S. 164; Rouse *v.* Letcher, 156 U. S. 47; White *v.* Ewing, 159 U. S. 36. We think, then, that the court had jurisdiction of the case made in the ancillary bills."

II.

The Circuit Court of Appeals erred in its decision on the merits.

If this Court holds that the order appealed from was an interlocutory order, then the Circuit Court of Appeals had no jurisdiction and a proper disposition, as we have already indicated (*supra*, p. 3), will be to vacate its judgment and dismiss the City's appeal. It will then be wholly unnecessary to consider any question of the merits. If this Court concludes that the Circuit Court of Appeals had jurisdiction then its order deprived the Receivers of all right to have the validity of the City's action in respect to the franchise judicially reviewed, and it was erroneous in law.

The Circuit Court of Appeals unjustifiably confused

> (*a*) absence of power to enjoin legislative action,
> (*b*) with absence of power to adjudge and enjoin the effects of such action;

and because it held (*a*) that the proposed resolution was legislative and could not be enjoined

> it also held (b) that the Receivers could not thereafter have any judicial inquiry as to the validity and effect of the alleged legislative action upon the life of the right to use the streets and operate the railroad.

These two propositions (*a*) and (*b*) are not related and should not be confused;

> if (*a*) the passage of the resolution could not be enjoined because it was legislative, it by no means followed (*b*) that its effect when

passed could not be judicially inquired into; nor (*c*) that in advance of its passage, if threatened, the City officials holding no legislative position (Order, Transcript, pp. 125-126) could not be enjoined from carrying it into effect until they had asked leave of the Court and had demonstrated to it the validity of the resolution and the extent of its operation.

So that, the conclusion that the passage of the resolution was a legislative act, still left open the question whether and to what extent it could be put into effect by the City officials.

We maintain that:

1. the resolution of forfeiture was not a legislative act.
2. the City was not in a position to declare the forfeiture;
3. the forfeiture did not operate automatically;
4. the Receivers were entitled to relief in equity.

Our principal brief demonstrates each of these propositions and the main arguments need not be repeated here:

We will, however, reply to the City's answers to our arguments.

1.

The Resolution of Forfeiture was not a legislative act.

The City points to no Law of New York expressly empowering the Board of Estimate or the City to revoke a franchise to use the streets.

It does not follow that because the power to grant such a franchise may be a legislative power, nor because the City may couple its consent to the use of the streets with a condition subsequent, that the revocation of such a franchise upon the claim of a breach of the condition subsequent is a legislative act. To be a legislative act it must be the exercise of a delegation of the power to legislate, and not merely the assertion of the right ensuing upon the breach of the condition subsequent.

The City's Brief asserts (p. 57) that the proposed resolution was the exercise of the legislative power delegated by Chapter 629 of the Laws of 1905, Secs. 10, 11.

The opinion of the Circuit Court of Appeals (Transcript, pp. 136-150) after determining (p. 143) that the condition was inserted in the *contract* by authority of law (though attributing it to a grant of authority to secure efficiency of public service at *reasonable rates*—not we submit, to secure completion of construction), and that the power to grant a conditional consent is not open to controversy in the State of New York (a question, we submit, wholly distinct from whether taking advantage of the breach of condition is a legislative act), and after determining that the exercise of the power to grant and *revoke* had been transferred to the Board by Laws of New York 1905, Vol. 2, p. 1535 (Transcript, p. 144), showed that the City *claimed* that in exercising that power, it was exercising legislative power. The opinion concludes (p. 144) that because the *grant* was an act of the Board, in a governmental capacity, its resolution declaring the grant at an end is equally an act in a governmental capacity, as the agent of the State, and for the promotion of the public good.

The only authority cited for this proposition is, not a New York authority, nor a New York law, but a Kansas decision (*Edson* vs. *Olathe*, 81 Kans. 328, 331).

We have in our principal brief (pp. 132-133) shown that while the authority cited did determine that in that case (which may have been dependent upon its own circumstances) the City was not liable in damages for enacting a repealing ordinance, and based its conclusion upon the argument that the repealer was a *governmental act*, and, therefore, made the City immune from suit for passing the ordinance, nevertheless in a subsequent stage of the same suit, the Court stated that while the City acted legislatively in passing the repealing ordinance, still the ordinance, from the face of the petition was void, and upon proper application an injunction would have issued against the officers and agents of the City to restrain them from enforcing the ordinance and from disturbing the plaintiff in the enjoyment of its franchise rights.

Now, in our case, the District Court's order did this very thing (*supra*, p. 10), yet the opinion of the Circuit Court of Appeals does not advert to this fact. We assume that it was regarded as unnecessary because it did conclude (p. 146) that the railway company did not comply with its contract, and that the Court upon accepted principles of equity could not relieve of the forfeiture (p. 147). It asserted (p. 147):

> "In this case the grant and *forfeiture* grow out of the exercise of legislative power and of contractual obligation."

and again:

> "It can make no difference that the franchise was forfeited automatically by the fail-

> ure to complete the trolley line within the period prescribed, and that the forfeiture 'of the railway' to the City of New York is to become effective from the date of the passage of the enjoined resolution. The forfeiture of the one is as good as the forfeiture of the other. Just what is meant by the term 'railway' in the *resolution* of forfeiture is not before us and is not determined."

Yet, though the Court did not consider that what was to be so forfeited was before it for determination and did say it was not determined, nevertheless it left no way open to the Receivers to determine its extent, beyond reserving to them the very limited right, resting in their belief and advice to them to apply to the Court to prevent future interference with *"visible and tangible property"*. So that, although the meaning of the thing to be forfeited was not considered by the Court, the Receivers were only to be permitted to question that meaning by contending that it did not mean "visible and tangible property".

We shall reserve for discussion below (pp. 55-69) whether the Circuit Court of Appeals was correct in its view that the franchise was forfeited automatically, that the Company did not perform its contract, and that equity should not relieve the Receivers, and shall confine ourselves for present to the argument that

> *the resolution of forfeiture was not an exercise of legislative power.*

Both the City (in its Brief) and the Circuit Court of Appeals base this legislative power specifically upon the Act of 1905, Ch. 629.

Let us examine that act.

The City (Brief, p. 57) says the power is to be found in Secs. 10 and 11.

The Circuit Court of Appeals says it is to be found in the power to secure efficiency of public service at *reasonable* rates (Opinion, p. 143), and attributes it to Sec. 73 of the act.

Sec. 10 of the Act of 1905, Ch. 629, is Sec. 72 of the New York City Charter as amended; Sec. 11, is Sec. 73 of the Charter as amended. So the City and the Circuit Court of Appeals find the legislative power to pass a resolution forfeiting a franchise, in the same law, though the City appeals to one more section than the Court, for this legislative authority.

The text is printed in the City's Brief, pp. 197 198. We, therefore, do not repeat it here.

An examination of Sec. 72, shows that it does not mention any revocation or forfeiture of a franchise, but merely "every *grant* of or relating to a franchise."

Therefore, the delegation of legislative power in this section relates to the *granting* of franchises, and not to their revocation or forfeiture.

We submit that from the delegation of a power to *grant* a franchise, which, when granted becomes property (*supra,* p. 23) no implied authority to exercise legislative power in revoking or forfeiting such franchise arises.

It is provided by the said Sec. 72 that the *grants* which it authorizes shall be

> by ordinance of the Board of Alderman;
>
> or by resolution of the Board of Estimate and Apportionment;
>
> or a *contract executed* by or under the authority of the said Board of Estimate and Apportionment.

The Board then, has the option or discretion, under the law, whether it shall proceed in *granting* a franchise, to proceed by resolution

or by *contract.*

In the present case it proceeded by *contract;* and, we submit that the making of a *contract* is *not* the performance of a legislative function; it is an executive function; the Board does not make it, it authorizes it.

There is neither express nor implied authority in theBoard, under this section, to act as a legislative body in enforcing any of the provisions of the contract which it authorizes.

So far as this section is concerned, its legislative power is exhausted when it authorizes the contract.

Thereafter, if it has any power, so far as this section is concerned, it is not derived from the delegation of legislative power; it must be a power conferred not by the People of the State, but by the contract so authorized.

We may, therefore, dismiss this section from further consideration as a source of any legislative power to revoke a franchise, or to take advantage of any condition subsequent in a contract.

Sec. 73 of the City Charter (City's Brief, p. 197) in which the Circuit Court of Appeals found the legislative power of the Board to forfeit, provides that no franchise or right to use the streets shall be granted "by any board or officer of the City of New York under the authority of this Act" (thus putting officers in the same category with the board), for a longer period than twenty-five years (with the exception of provision for renewals), and

> "At the *termination* of any franchise or right granted by the board of estimate and

> apportionment, all the rights or property of the grantee in the streets * * * shall cease without compensation."

The *termination* here contemplated is the expiration of the period limited in the grant. It does not, in and of itself, contemplate an earlier termination, a forfeiture, or a condition subsequent; and does not expressly or by implication confer a legislative power to revoke, forfeit, or enforce a condition subsequent.

The section proceeds (City's Brief, p. 198):

> "Every such *grant* of a franchise, and every *contract* made by the City in pursuance thereof, *may* provide that upon the *termination* of the franchise or right granted by the board of estimate and apportionment, the plant of the grantee with its appurtenances,
>
> shall thereupon be and become the property of the City without further or other compensation to the grantee,
>
> or such grant and contract *may* provide that upon such *termination* there shall be a fair valuation of the plant which shall be and become the property of the City on the *termination* of the contract on paying the grantee such valuation."

We submit that it is doubtful whether under this power the City could contract to pay value at an earlier date than the expiration of the period fixed in the grant.

But however that may be, thus far there is no power to affix any condition subsequent, or to forfeit, and there is no automatic legislative provision for forfeiture; there is express provision for cessation at the termination of the franchise, and there is provision for devolution of property upon such termination with or without compensation as the parties may agree; but there is no dele-

gation of any legislative power to forfeit, thus far in the section.

Then the section does contain a forfeiture provision, as follows: (City's Brief, p. 198):

> "Every *grant* shall make adequate provision by way of *forfeiture* of the *grant* or *otherwise,*
> to secure efficiency of public service at *reasonable rates,*
> and the *maintenance* of the *property* in *good condition* throughout the *full* term of the grant.
> The grant *or contract shall* also specify the mode of determining the valuation and revaluations therein provided for."

It will thus be seen that the legislature did not affix forfeiture as the necssary penalty for default; it left it optional with the parties to agree upon the provision, which it authorized, and the penalty. But it limited the purpose for which the provision was designed. It was to be a provision to secure efficiency of public service at *reasonable* rates; and the *maintenance* of the property in *good condition.*

In other words the legislative *power* which it conferred was exhausted when the form of the grant was determined; thenceforth the *rights* of the parties were to be determined from the provisions of the grant, or the contract which embodied it; but the legislature conferred no legislative power beyond the making of the grant. It conferred no legislative power either to revoke or to forfeit the grant; and it limited the power of forfeiture, which it authorized, to provisions in the grant, and it limited these *provisions* to those which should be adequate to secure efficiency of public service at reasonable rates, and the main-

tenance of the property in good condition throughout the full term of the grant.

We submit, therefore, that this law of New York which is referred to by both the City and the Circuit Court of Appeals as the basis of the legislative power to forfeit for failure to construct does not justify any such conclusion. It would not justify it if it stood alone as the basis of such asserted legislative power. But our argument is strengthened by the further consideration that the City Charter in conferring powers respecting street railways was made subordinate (N. Y. Charter, S. 45, Principal Brief, 131) to the General Railroad Law of the State, and this law itself prescribed the penalties for failure *to complete construction*. We have elaborated this part of the argument in our principal brief (pp. 130, 131), and will not repeat it here.

The penalty of forfeiture was provided by the Railroad Law (Principal Brief, p. 130), but its conditions were there prescribed; they were made dependent upon the circumstances of the particular case, and it was *expressly* provided thereby, that if any delay of completion was occasioned by *any* cause not within the control of the corporation the time for performance should be deemed to be correspondingly extended.

Thus had the legislature itself acted; it not only withheld from the City the power to forfeit for non-completion, but it prescribed definite terms, a definite period (3 years) and a definite cause for extension of time. All of these provisions of positive law of the State of New York were utterly disregarded when the Board attempted to take the law into its own hands, and, as it now contends, to act legislatively.

We have demonstrated, to a certainty, we submit, that whatever its contract rights may have

been, in attempting to act under those rights it was *not acting* legislatively, and no injunction could properly be refused on that ground.

We have shown in our principal brief (pp. 122-129; 132-134; 141-146; 170-172) that upon general principles of decided cases, it cannot be held that the Board was acting legislatively. We have shown above that it was acting in violation of the positive law of the State.

None of the cases cited by the City sustain its contention. None of them determine that a resolution of forfeiture is a legislative act.

The State Constitution, Art. III, S. 18 (Principal Brief, p. 120; City's Brief, p. 175) by limiting the power of the legislature to pass a law authorizing the construction or operation of a street railroad, so that it must be a condition that the consent of property owners and of local authorities having control of the streets first be obtained, did not confer *law making* power upon the local authorities any more than it conferred *law making* power upon the adjoining property owners whose consents were also required. (Principal Brief, pp. 125-129).

Now, as to the cases cited by the City:

In *Wilcox* vs. *McClellan*, 185 N. Y. 9.
Ghee vs. *Northern Union Gas Co.*, 158 N. Y. 510, 512, 516.
Matter of International Ry. Co. vs. *Public Service Commission*, 226 N. Y. 474.

No question of the legislative character of a resolution of forfeiture is involved; and, therefore, these authorities throw no light on the present point.

It is true that in *Iron Mountain R. Co.* vs. *City of Memphis*, 96 Fed. R. 113, arising in Tennessee and not in New York, it was considered, for the

purpose of determining that a resolution of forfeiture violated the constitutional inhibition against laws impairing the obligation of contracts, that it was a legislative act; but it had already been determined (pp. 120) that the municipal body was a state agency and a trustee for the public, and that its act in that capacity was a violation of the Fourteenth Amendment to the Constitution of the United States, just as (for illustration, p. 122) are acts of a judge, and of a Commissioner of Jurors, or a State Railroad Commissioner, or the judgment of the highest court of a State; and assuredly these are not *legislative* bodies.

It was accordingly determined that (p. 123):

> "whether the action of the railroad company with reference to rights was a breach of the condition, and justified a forfeiture or *not*, an attempt by the City through a resolution by its legislative council, declaring the forfeiture on that account, and the forcible taking possession, would *together* constitute the *taking* of property of the railroad company without due process of law."

In our case, it was the things taken together which were enjoined.

So, too, in the case cited, the Court said (p. 123) that the terms of the forfeiture in the stipulation of the parties was like an ordinary condition subsequent in a lease; and it would be novel law to hold that under such a clause the lessor might repossess himself by force and arms if resisted.

Mr. Justice Taft said (p. 124) that in such a case equity would enjoin the threatened use of force without respect to the question who has the right of possession (citing numerous cases of injunctions against municipalities in favor of

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To the cases already cited we desire to add *North Jersey St. Ry. Co.* vs. *Inhabitants of Township of South Orange,* 58 New Jersey Eq. 83; 43 Atl. Rep. 53. In this case Vice-Chancellor Pitney, one of the most eminent jurists of the State of New Jersey, held that the grants of franchises are executive in their character and usually the revocation and repeal of such grants are executive, but that in a case where the legislative body by the terms of the ordinance is vested with power to adjudge a breach of duties and obligations and declare a forefeiture, an ordinance passed pursuant thereto is judicial in its character and equity has power to intervene by injunction. He advised in that case a temporary injunction going much farther than is necessary to go in the case at bar, because in that case there were no conditions precedent which were necessary to be fulfilled by the municipality before it was in a position to pass upon the alleged breaches of duty or violations on behalf of the railway company. He also deals with the question of forfeiture in an illuminating manner. He distinctly holds that ordinances of the character of that case, which was similar to that in the instant case, are not legislative in their character, holding that "ordinances are legislative in their character only when they prescribe a rule of civil conduct, or alter or repeal a previous ordinance of that character." We respectfully submit that this well-reasoned opinion is useful upon many of the branches of the instant case.

street railroads). He also said (p. 125) that for the purposes of that question (the violation of the Fourteenth Amendment) it was not important whether the threatened taking possession by force was legislative or executive, and the Court sustained the injunction to that extent, but, upon the appeal of the railroad company against the refusal to enjoin the resolution of forfeiture, he said that the question was *much more difficult.* If it was a law of the State, *it was immaterial* how it was to be enforced, if it violated the provisions of the United States Constitution respecting the impairment of the obligation of contracts or respecting interstate commerce (p. 126). He added:

> "Where the sovereign makes a grant upon condition subsequent, the breach of condition does not of itself divest title and right of possession, but the power is in the *sovereign,* as grantor to manifest his will that the condition shall be enforced, and *this manifestation of will is by legislative action.* In this case the condition expressly requires that the *council* should exercise an option before forfeiture should ensue. In exercising such an option the council is acting in a legislative capacity. Its declaration is law."

Then the opinion (pp. 126-127) cites and discusses authorities to the effect that—

> the *mode* of asserting or of assuming the forfeiture grant is subject to the *legislative authority* of the government; *it is not conclusive,* of course, of the facts asserted and may be judicially resisted.

but if the condition in fact has been broken, it operates to divest the title and the right of possession.

An examination of the statute law of Tennessee in that case (p. 120-127) shows that the council

was vested with legislative authority over the streets. It was accordingly held that the resolution was a law of the State within the meaning of the Constitution; but (p. 129) it was only legislative action equivalent to reentry upon condition broken in its effect upon the title and right of possession. And, if the condition was not broken, it impaired the obligation of the contract. It appeared, for the purpose of the discussion (p. 131) that it was alleged that the condition was not broken; it was, therefore, concluded that a case of jurisdiction in the Federal Court for a violation of the alleged constitutional right was made out, and, therefore, that subsequent suits in the State Court to enforce the unconstitutional resolution could and should have been enjoined pending (p. 132) an investigation into the facts in the Federal Courts, having first acquired jurisdiction.

While as we have said (*supra*, p. 36) that it is true that in this case Mr. Justice Taft did conclude that the Memphis City council in passing a resolution of forfeiture for breach of condition was acting legislatively under the laws of Tennessee which he examined, no question of the right to enjoin the passage of such resolution was involved; it was already passed; the Court below was reversed for refusal to enjoin suits in State Courts to enforce it, and was directed to inquire into the facts and declare the rights of the parties. So that the legislative act in that case did not preclude the fullest investigation of the facts by the Court and an injunction in the meanwhile against any and all steps to carry it into effect.

And, too, it will be noted, that there the Memphis council was the body, under Tennessee law, clothed with full power over the streets, and it was only for that reason (p. 127) that its act was

held to be a law within the constitutional prohibition.

But here, the Board of Estimate and Apportionment is *not* clothed by the law of New York with legislative power over the streets; it is subject to the railroad law, and its power of forfeiture is restricted; and section 179 of the railroad law contains its own provisions for forfeiture for nonconstruction, and these are expressly made subject to Court action.

The facts relating to the two municipal bodies are, therefore, so dissimilar that the principles of the case cited have no application here.

In *Knickerbocker Trust Co.* vs. *City of Kalamazoo*, 182 Fed. 865, at pp. 870, 871 (Denison, D. J., W. D. Mich.) in discussing the academic question whether a resolution of forfeiture was a legislative act, referred to the *Olathe* case (Principal Brief, p. 132, *supra*, p. 29) and to the *Memphis* case (*supra*, p. 36), and indicated of the latter that "it would seem to follow that it was sufficiently legislative to be exempt from antecedent injunction," (a question not necessary to be actually determined in the Memphis case) and he deemed it unnecessary (p. 871) to determine whether an injunction would lie to prevent the passage of the resolution, but he enjoined (p. 875) the City from doing any acts in violation of the franchise contract or calculated to cause a forfeiture, or in furtherance of or in execution of the proposed forfeiture, and expressed a doubt whether under these conclusions the council would make it necessary to determine whether an injunction should be awarded directly against the passage of the proposed resolution. He added (p. 871)

> "Regardless of the form of the injunction the underlying question is as to the power of the City to declare a forfeiture, *and I am*

satisfied that the City has no power to determine that this franchise was forfeited, whatever the default of the railway company may be, but that such determination can be made only in a judicial proceeding, in a proper court, where both parties may be heard, and the issue as to their respective rights, impartially determined."

It appeared (p. 871) that the charter provision was: that after notice "the rights, privileges, interest, permission, and authority hereby granted shall *thenceforth cease and determine"*, and the City should be entitled to take possession of the streets, and hold possession of the property, such as tracks and cars, as security that the company would leave the streets in good condition.

These two cases are substantially parallel, if not identical, and the injunction was granted by Denison, D. J. notwithstanding substantially similar arguments to these made now were then made in opposition.

It Follows that there was nothing in law to prevent the issuance of an injunction in this present case

both against the proposed resolution of the Board

and against the officers and employees of the City to prevent carrying it out.

The sole remaining question then is whether the Receivers' contention was so obviously without *any* merit on the facts that it would be against equity to give them any relief,

and this divides itself into two inquiries—

whether the forfeiture provision in the contract was self-operative

whether upon the facts it had operated.

We have already shown (*supra*, p. 39) that in general the question of forfeiture for breach of condition subsequent is always a judiciable question; the exceptions, if any, are rare. The facts of the present case afford no basis for any exception.

Since it is immaterial whether it was self-operative or not, if the facts did not support its operation, it is well to examine these facts, first

2.

The facts did not support any forfeiture however declared.

In our principal brief (pp. 48-71) we showed that as a matter of fact

> the City of New York had not acquired title to the streets involved nor regulated and graded them and hence that the City was not in a position under the contract to require the extension; this fact is graphically represented upon the map inserted at p. 69 of our principal brief.

We also showed (pp. 85-107) that properly construed the right of forfeiture upon which the City relied did not by its own terms apply to the facts which the City asserted, and even if those facts were true the condition subsequent upon which the City relied (Sec. 5, Paragraph THIRTEENTH in the original contract, Transcript p. 54, Resolution, Transcript, p. 35) did not apply to the alleged breach relied on; that the only applicable forfeiture clause was the clause *substituted* for Paragraph SEVENTH of Sec. 3 in the contract of October 29, 1912, by the contract of modification made January 21, 1916; and that this substituted clause made substantial changes in the provisions of the contract in respect to forfeiture;

and that *this* forfeiture clause never contemplated the forfeiture of the *entire* grant, or the entire railway, or the termination of the entire contract, or the vesting of the tracks or equipment in the City, for failure to complete the *extension* of the railway which the City required to be extended; and that the condition precedent to that requirement had not been complied with by the City; and that, therefore, the City had no right of forfeiture whatsoever. And further that, if the City's contention of fact was true, its right of forfeiture was not as extensive as its assertion.

But since the City in its brief argues that the facts did justify the assertion of the right and that its condition precedent had been complied with, and attempts to show this as a matter of fact (City's Brief, pp. 108-135), we will supplement the statement and argument on the facts in our principal brief, (pp. 8-12; 48-84; 146-165) by adding the following resumé of and argument upon the *facts disclosed by the record.*

The modifying contract of January 21, 1916 (Transcript, pp. 68-72) contained the following provision (Transcript, p. 70):

> "The Company shall complete and put in operation that *portion* of its railway herein authorized between the present terminus thereof, at the Long Island Railroad Company's station, at Jamaica, and the intersection of Sutphin Road (Guilford Street) and Lambertville Avenue (Pacific Street) on or before May 1, 1916" (This portion of the road is completed—see map inserted at p. 69 of our principal brief).
>
> And the *remainder* of its said railway between said intersection of Sutphin Road (Guilford Street) and Lambertville Avenue (Pacific Street) and the City Line at Central Avenue

> within such times as may be directed by resolution of the Board upon recommendation of the President of the Borough,
> *provided* that title to the *streets involved* has been vested in the City and that said streets have been regulated and graded."

The City maintains (Brief, pp. 8-9; 108-116) that "streets involved" meant new streets over private property, but that as to Central Avenue as it was then open physically and had been from 1860 or earlier, even though its name was changed later to Westchester Avenue, 17th (117th) Avenue, and Dearborn Avenue (City's Brief, p. 9); (map inserted, our Principal Brief at p. 69), and even though these newly named streets were shown on City maps at the time of making the contract of January 21, 1916 as having wider lines, still the parties did not mean the new streets, nor the wider streets, but only meant (City's Brief, pp. 109-110) the old streets such as Pacific Street and Central Avenue over which the franchise was granted and the new streets over private property, and which were outlined on the tentative map of January 11, 1912.

In other words, the City contends that though the modifying contract of January 21, 1916 contained the *proviso* for the first time, and though by that time the City had adopted new and final maps (City's Brief, pp. 9-12), and though (p. 10) on October 29, 1912, 117th Ave. and Dearborn Avenue were not even paper streets, and though by January 21, 1916 the City had adopted final maps establishing lines and grades (pp. 10-11) and adjusting lines and establishing grades, including (p. 11) Westchester Avenue, 117th Avenue and Dearborn Avenue to the New York City line, and altering the lines and grades of Lambertville Avenue, and altering the grades of Old Central

Avenue, still when in 1916, the parties contracted with respect to the extension, they contracted with respect to the condition as it was in 1912, and not with respect to the changed condition as it actually was in 1916, and that when they inserted the *proviso* (which was certainly prospective in its operation) they were both contracting with respect to a situation which had already been changed by the City, and that the contract of January 21, 1916 meant that the railroad company would extend its road over the new streets represented on the final maps adopted in 1913, after the contract of 1912, provided that the City had title to the old streets and had regulated and graded the old streets, though the extension was to be over the new streets.

This construction of the contract is not plausible nor rational; indeed, we maintain that it is absurd; it narrowly construes the words "streets involved" used in a substitute inserted in the contract of 1916 as applying to the streets named in the original contract of October 1912 and its maps, though the extension was to be upon streets established by the new maps.

We submit that the proper construction of "streets involved" in the contract of 1916 is to refer it to streets on which the extension is to be built, and not to streets as they existed at the time of the original contract. The City's brief concedes that this is true as to paper streets as they existed in 1912 and had not then been acquired by the City, but denies that it applies to streets, or roads, existing in 1912, subsequently changed by City maps adopted intermediate the the contract of 1912 and the contract of 1916.

Even if the City were correct in its contention, this would be a substantial reason why the Court should enjoin its arbitrary action until the City

could demonstrate the correctness of its contention on application to the Court, when the Receivers could present evidence to controvert the City's contention as to the meaning of the parties.

This is illustrated by the fact that even now, in order to explain and maintain its attitude the City must needs annex additional maps which are not in the record and were not before either of the Courts below in the record. (Maps of November 2, 1911; Map of January 20, 1913, annexed to City's Brief, following p. 215; referred to in City's Brief, pp. 9-10).

We submit that the City's argument (Brief pp. 9-12; 108-110; 110-116; 116-134; 135-146) shows that the *District* Court was fully justified in enjoining the City (Transcript, p. 125):

> "without prejudice to any further or other application to this Court for the enforcement of any claim or right of the City of New York as to said matters."

We submit that it was entirely proper procedure for the District Court to require the City to further demonstrate the soundness of its contentions upon a proper application to the Court when its rights could be fully considered upon such facts as it could adduce, rather than to permit it to proceed summarily and in disregard of the receivership to do its will as it pleased.

And further, we submit that the District Court was and is the proper place to conduct that inquiry, and the very argument of the City shows that no Court on appeal should be required to adjudicate it upon this record.

> But if this Court concludes that this fails to demonstrate that the District Court was entirely justified in its action, and that the matter can and should be properly argued

here, then we controvert the City's argument and show that it is in error on its facts as follows:

A. Meaning of the Words "Streets Involved."

The City maintains that "streets involved" as said words are used in the proviso clause of the franchise amendment of January 21, 1916, mean, as to the portion of the extension of the railroad ordered from the intersection of Sutphin Road and Lambertville Avenue to Merrick Road, the streets as laid out on the City's official maps, but, as to that part of the extension ordered beyond Merrick Road to Springfield Road, mean not the streets composing such extension as the same are laid out on the City's official maps but old Central Avenue as it physically existed in 1860, or prior thereto. The reason assigned by the City in support of its claim, as to part of the route, "streets involved" mean map streets, and as to the other part mean not map streets but old Central Avenue as it is claimed to have existed prior to the time old Central Avenue became a part of the City, is briefly this: The City, at the time of the franchise contract had not vested title in the map streets but did, as it claims, possess some easement or title to said Central Avenue, or a portion thereof. As the franchise mentions the map streets by name composing the route up to Merrick Road and beyond Merrick Road describes the route as Central Avenue, therefore, the parties had in mind said map streets and said Central Avenue as it existed prior to the franchise as composing said route of the extension ordered. The answer to this is twofold: First, there is nothing in the franchise contract, itself, or in the record, from which it can be inferred that "streets involved" mean as to a portion of the

route map streets and as to the balance thereof streets as claimed to have existed in the year 1860 or prior. Second, the City's claim that the portion of the route beyond Merrick Road is designated in the franchise contract only as Central Avenue is erroneous. The franchise contract at bottom of page 39 and top of page 40, contains a description of the portion of the route, which includes the street formerly known as Central Avenue, as Westchester Avenue. Also the map annexed to the franchise of October 29, 1912, shows what was formerly Central Avenue as Westchester Avenue beyond Merrick Road (Map 2, p. 181). Moreover, Westchester Avenue just referred to is described in the franchise (pp. 39-40) as part of the route "lying within certain streets as shown by map commonly known as 'Jamaica Map', *which was adopted by the Board of Estimate and Apportionment January 11, 1912,* and showing the street system and grades, etc."

This reference to the City's official map excludes all possibility of any contention that the "streets involved" as used in that contract can mean anything other than streets as laid out upon the City's official map.

Thus the claim by the City that Central Avenue is not shown as a map street in the franchise itself is completely refuted by the description of the route as lying within the streets shown upon said official map, among which streets is mentioned Westchester Avenue (formerly Central Avenue) from the termination of Ulster Avenue (being at or near the point where the Merrick Road intersects) to the City line.

Not only is it clear that at the time of the franchise contract, October 29, 1912, the part of the route sometimes referred to as Central Avenue is shown in the franchise itself as Westchester Avenue, and as a map street, but there is the further fact that the City prior to the franchise amendment of January 21, 1916, to wit: on November

12, 1915, adopted a final map of the streets comprising the extension from Merrick Road to the City line upon which Central Avenue is shown as a map street consisting of Westchester Avenue, 117th Avenue and Dearborn Avenue (map 6, p. 185). This map is admitted by the City in its Answer (p. 92) and in its brief at page 12, to be the official final map.

The reason why the City would like to create the impression that "streets involved" means one class of streets as to a portion of the route and another class of streets as to the balance of the route is obvious. The City in its brief concedes by its argument that it was incumbent upon it before it could order the Traction Corporation to extend its line to take title to and regulate and grade to the full width the portion of the route extending from the intersection of Sutphin Road and Lambertville Avenue to Merrick Road, but to excuse its failure to perform the equal obligation to vest in itself title to and regulate and grade to the full width the streets comprising the balance of the route from Merrick Road to Springfield Road raises the untenable claim that the parties did not have in mind any map streets beyond Merrick Road. As heretofore shown "streets involved" can and does mean only one class of streets—that is, the City's official map streets. Therefore, no distinction can be made as to the necessity of taking title and regulating and grading for the entire length of the extension ordered.

B. As to Lambertville Avenue Crossing of Long Island Railroad.

The City contends in pages 110 to 117, and again in pages 140 to 141 that it is not necessary for the City to take title to that portion of Long Island Railroad right-of-way involved in Lambertville Avenue crossing, because:

(a) The City claims that it was the understanding of the City and the Traction Corporation when the franchise was executed that the Traction Corporation would construct a temporary crossing at Lambertville Avenue.

There is nothing in the franchise agreement, or amendment thereof, or in the record sustaining this claim.

The fact that the Traction Corporation on petition obtained the right to cross a freight-siding of J. and T. Adikes at grade at an entirely different place than the Lambertville Avenue crossing of the Long Island Railroad, is not evidence of any understanding that it would, at great expense to itself, construct upon a private right-of-way a temporary trestle over the railroad tracks of the Long Island Railroad at Lambertville Avenue.

(b) The City claims that in obtaining the order of the Public Service Commission permitting it to extend Lambertville Avenue under the tracks of the Long Island Railroad at said crossing it had done its part under its contract, that it remained for the Long Island Railroad to construct the railroad crossing; that it is the *practice* of the City not to take title to a street crossing, but only to acquire the fee up to the railroad right-of-way and there stop, and that the proceedings before the Public Service Commission, determining the manner of crossing, gives the City sufficient title to carry the new street across the Long Island Railroad right-of-way.

None of these contentions is sustained by the record in this case or by statute. The City has not done its part by simply filing a proceeding to obtain the order of the Public Service Commission determining whether said street will cross at grade, above or below grade. The order of the Commission in such proceedings determines only the manner of crossing.

There is no proof of any such custom *in the record* that the City condemns only to the right-of-way. There is likewise no proof *in the record* that the City does not have to obtain title to that portion of the street crossing the railroad right-of-way.

The case cited at page 116 of the City's brief, (Matter of City of New York, 84th Street, 189 App. Div. 315), is not an authority for any of the propositions claimed for it. That case simply decided that sufficient notice had been given to the railroad of a hearing to determine the necessity of the crossing involved.

Not only is there no proof in the record that it is the custom of the City of New York to condemn the fee of the street to the railroad right of way, but the record shows affirmatively that the City would have to acquire title to Lambertville Avenue where said avenue crosses the Long Island right-of-way, if the City were to extend the street to make such crossing. This is shown by the City's official map. Upon that map the street is laid out as making such crossing and is given damage parcels numbers 74 and 75 (Damage Map 4, p. 183).

Moreover, Section 92 of the Railroad Law, cited at page 184 of the City's brief shows that the municipal corporation shall acquire title to such crossing either by agreement with the railroad or by condemnation.

In whom would title be to a City street if not in the City, when that street is constructed under, over or at the grade of a railroad crossing?

Also how could the City be charged with the expense, or part of the expense of constructing the road across if it had no title thereto (see Subdivision (2), Section 94 of the Railroad Law, set forth at page 186 of City's brief)?

INSERT (1) PAGE 46

It may be noted the City practically concedes that there should have been no final disposition of the controversy upon this record. This is shown on page 29 of the City's brief where it is stated, in effect, that it objected, before the District Judge, to the disposition of the controversy in this case on affidavits without the benefit of a trial where witnesses could be examined and heard, but the District Judge overruled the objection and determined the matter on the merits. There is no reference to the record to support this claimed objection, and there is no such objection in the record. On the contrary, as has been fully shown heretofore, the District Court, by its order, expressly left open the matter of the final determination of the claim or right of the City of New York.

In any event, the whole argument of the City's brief does not show any obligation on the part of the Traction Corporation itself to construct this crossing. It is obvious that the Traction Corporation could not be compelled to construct its road over this crossing until the street had been prepared for it, as provided in the contract amendment of 1916.

C. As to the City's failure to take title to the full width of the streets beyond Merrick Road to Springfield Road.

Although the City by its argument concedes that it was a necessary condition precedent to requiring the Traction Corporation to extend its line from the intersection of Sutphin Road and Lambertville Avenue to Merrick Road, to itself first take title to the full width of the streets as laid out upon the City's official maps of said streets, it contends as to that portion of the extension beyond Merrick Road to Springfield Road no like obligation upon it exists. The reason assigned is the original franchise does not mention any streets beyond Merrick Road as laid out upon the City's official maps. It has been shown heretofore under A (*supra*, pp. 47-49) that such claim is erroneous. As the streets in question are laid out upon the City's official maps as streets eighty feet in width, the City did not perform the condition precedent of vesting title to said streets by taking title to only a portion of the width, to wit, fifty feet thereof.

Likewise the attempt to support the City's claim in this respect, by a contention that title to this fifty feet was already in the City prior to the franchise, and, therefore, the parties must have had in mind the street as it existed prior to the franchise, not only overlooks the fact that the

franchise specifically refers to streets in question, as shown upon the City's official map, but also the fact that there is no competent proof in the record to show title in the City to this fifty foot strip prior to the franchise. The City relies upon the affidavit of one Tucker (pp. 101-103), an engineer in the Topographical Bureau of the Office of the Borough President of Queens, who says he is familiar with the City maps. Said affidavit then makes certain claims to title unsupported by any competent proof. The fact is that the City, on the very day it ordered the Corporation to make the extension, passed a resolution taking title to fifty feet in width of said streets between Merrick Road and Springfield Road. This act in itself, in the absence of other proof, shows no title in the streets in question prior to the date of said resolution, to wit, February 16, 1917 (pp. 9, 10, 108).

D. Regulating and grading.

The City contends that it was not required to regulate and grade the portion of the route between Merrick Road and Springfield Road, for the reason that the so-called user grade approached the City's official map grade. The only proof of the claimed approach is the affidavit of said Tucker, who qualifies as familiar with City maps, but is not shown to have any actual knowledge of the so-called user grade. The real fact is that there was no regulating or grading done beyond Merrick Road. This is shown conclusively by the report of J. J. Blake, City Engineer of Highways, to the Borough President of Queens, dated February 19, 1917 (pp. 74-75). Therein Blake states that he has been requested to advise as to whether the streets comprising the route of the Traction Corporation, in question, have been regulated and graded to the full width, as required by the last map of the City. After showing that regulating

and grading has been done as required by the City map up to Merrick Road (except Lambertville Avenue crossing of Long Island Railroad) Blake further states positively that "no work has been done on Central Avenue between the Merrick Road and Springfield Avenue excepting the laying of an asphaltic concrete pavement sixteen feet in width which is approximately to the grade shown on the final map." In other words, all the work that has been done in respect to regulating and grading, if any, by the City, between Merrick Road and Springfield Road relates solely to sixteen feet in width of asphalt pavement. There is no proof whatever of any regulating or grading on either side of said asphalt. In fact it is apparent there would be no prior regulating or grading of a street, title to which is vested in the City simultaneously with ordering the Corporation to make the extension in question. If further proof is required that no regulating or grading has been done on either side of this strip of asphalt, the same is furnished by the affidavit of Clifford B. Moore, consulting engineer, (pp. 117). In his affidavit, he shows that the location offered to the Traction Corporation for its tracks is *permanent* as to lines and grades up to Merrick Road but beyond Merrick Road the location offered is *temporary.* Said Moore attaches to his affidavit a map showing the temporary location so offered, upon which the tracks of the Corporation's street railway are located to the north and beyond the sixteen foot strip of asphalt (Map 14, Transcript, p. 193). In other words, the location offered was at a place where there is not the slightest pretense or proof of any regulating or grading. It is scarcely an answer for the City to say that it was not required to regulate and grade but could offer a temporary location because of the

franchise provision that, in the event the grade were changed, the Traction Corporation would have to relocate its tracks at its own expense. The proviso in question required the City to first regulate and grade before the Traction Corporation could be compellled to extend its road.

FURTHERMORE, even if the City were right in its contention as to the meaning of "streets involved" as used by the parties, it affirmatively shows by its argument on pp. 110-117 and on pp. 137-141 in respect to the Long Island Railroad crossing and in respect to its failure to acquire certain parcels that it attempts to substitue an *excuse* instead of performance of the condition precedent. Such an excuse ought not to be received as the basis of a forfeiture.

3.

The forfeiture claimed could not operate automatically.

We have already shown *supra,* pp. 37-41, the general rule.

We have also shown (principal brief, pp. 122-124) that this is the general rule, as well, in New York.

> *City of New York* vs. *Bryan,* 196 N. Y. 158, 168.

We have likewise shown (*supra,* p. 35) that the Railroad Law S. 179 contemplates that a franchise cannot be forfeited for failure to complete, without resort to a Court.

The City meets these general rules by contending that the contract reserved to it the right, and the Traction Company is estopped to deny its power.

It may well be questioned whether the alleged stoppel is not a purely personal defense against the street railroad company, and whether it operates against the Receivers; and whether, if the City actually lacked the power to exact the term in the contract, the Receivers are not still free to assert that lack of power.

The City itself asserts (pp. 101-102) that the self-operating forfeiture clause was the substituted clause—Paragraph SEVENTH of Sec. 3 (Transcript, p. 70); and we have shown (Principal Brief, p. 85-112) that this did not by its terms forfeit the entire franchise or the contract for the portions already completed and in operation, but only the *right to complete.*

The City also shows that it was not relying upon or insisting upon that clause (City's Brief, p. 102); but upon a clause which we have shown (*supra,* Principal Brief, p. 85-112) was not applicable to the facts; and which the City admits (Brief, p. 102) was not self-operative.

We have shown (*supra,* pp. 37-41, 55) that conditions subsequent are not self-operative. The City shows (Brief, p. 102) that it distinguishes between the forfeiture of the contract and the forfeiture of the franchise.

We submit that by attempting to proceed under Sec. 5, Paragraph THIRTEENTH which required action of the Board when justified by facts, the City waived, and failed to assert any right to reëntry growing out of its present contention that the alleged forfeiture operated automatically.

We have even shown (p. 114 of our principal brief), that in the Circuit Court of Appeals the City asserted that it waived it.

But the City cannot point to any provision of law which authorizes it to declare an automatic forfeiture, or to any provision of law itself, which

declares an automatic forfeiture, or to any provision of law which authorizes a contract for forfeiture, except as we have already shown (*supra*, p. 34) for forfeiture *after* the road is completed and in operation for failure to operate for reasonable rates and to maintain in good condition.

We have also shown (*supra*, p. 35) that the Railroad Law expressly provides the penalty for *failure to complete* and prescribes the remedy.

We are thus brought to the City's contention that it derives its right from the terms of its consent, which is required under the Constitution (City's Brief, Appendix 2, p. 175; p. 167). We do not note that the City lays any stress upon this contention or makes it specifically and directly.

We merely, therefore, call attention to the fact that the Court of Appeals of New York has refrained from determining what conditions the municipal authorities can attach to their consent (authorities cited, Principal Brief, p. 145); but it appears that they cannot impose a condition which is inconsistent with a State law (Principal Brief, p. 131).

The City has in its brief (p. 151), stated, in part, our position in respect to Sec. 179 of the Railroad Law and its control over the power of the City, and its effect in nullifying the power which the City claims to exercise.

The City, however, claims (p. 152)

> that the terms in the contract were not in conflict with the railroad law;
> that a self-executing forfeiture clause was directed by Sec. 73, of the City Charter,
> that New York authorities sustain the power of the City,
> and that the railway company is estopped to contest the validity of the forfeiture conditions.

We submit that upon a comparison of S. 179 of the railroad law and the terms of the forfeiture clause as now contended for by the City they will be seen to be in direct conflict (*supra*, p. 35), and that therefore, the City had not the power to exact such a condition as it now contends it did exact.

We have shown (Principal Brief, pp. 85-112) that the City by its contract, never did exact the forfeiture clause which it now contends it did exact;

> that Sec. 73 of the City Charter neither directed nor authorized such a forfeiture as the City now contends it did exact (*supra*, p. 32);
> that the authorities cited by the City do not sustain its contention;
> that the Receivers are not estopped to hold the City within the bounds of its lawful powers.

The City relies upon *Dusenberry* vs. *N. Y. W. & C. Tr. Co.*, 46 App. Div. 267-272, which, as we shall show (*infra*, pp. 61-64) is by express and repeated enactment made *inapplicable to New York City.*

An examination of that decision demonstrates that it does not sustain the City's contention in its entirety, and a further examination shows that it was construing a law which is not applicable in New York City. This was a suit by a private land owner to enjoin the construction of a surface railroad *in Westchester* County because the necessary private consents had not been obtained and the construction had not been begun within the time limited by the consent of the Highway Commissioner. One of the questions involved was whether the Highway Commissioner had the power to impose as a condition of his consent the requirement that the construction should be begun within a

time specified by the Commissioner shorter than the period prescribed in the Railroad Law as a period after which the franchise might be forfeited for not beginning construction.

This question depended upon whether the statute furnished the sole rule, or whether the Highway Commissioner might impose a condition containing a shorter period. He had actually not only imposed a shorter period, but had coupled it with the condition that if not completed and in running order within the shorter period, the franchise should be forfeited

> "and the rights and privileges granted by it *shall cease and determine without any action or proceeding in law or otherwise.*"

The Court (Appellate Division—2nd Department—an intermediate Court of Appeal, and not the highest court of the State) held that the Highway Commissioner could impose a condition for construction within the shorter period, *because* (p. 270) Sec. 93 of the Railroad Law as it then was (Laws 1890, C. 565, as amd. Laws 1893, C. 434) empowered the local authorities in their discretion to make their consent depend on any further conditions respecting other or further security or deposit suitable to secure the *construction,* completion and operation of the railroad within *any* time not exceeding the period prescribed in the law, and the law (Sec. 99) prescribed that if the railroad should not complete the construction within three years after obtaining the consents, its right, privileges and franchises shall cease and determine.

The Court also held, however, that (p. 272) while it did not lie in the Company's mouth to say that the condition which it had voluntarily assumed was void and unenforcible, still it held (p.

273) that while the language of the consent was broad enough in terms *ipso facto* to work a forfeiture *without* any legal proceeding, *such force and effect* should *not* be given to it, because there might be a legal excuse to the railroad company for not complying with it, and the Commissioner might have waived the condition, or a person seeking to take advantage of it might be estopped, hence legal proceedings were necessary to declare the existence of the forfeiture; but as the *prima facie* case on the moving papers had not been met by the railroad company, a temporary injunction was granted during the pendency of the action. It is obvious that this was an interlocutory proceeding, dependent in a measure upon the facts.

The Court distinguished *Matter of Kings Co. Elevated R. Co.*, 105 N. Y. 97, where a contrary decision had been reached upon the power of the local authorities to attach conditions, and on the authority of which the lower court had reached its conclusion that the asserted power did not exist, by saying that the scheme provided by the law in that case was different.

Now if we examine the Railroad Law of New York (Laws 1910, C. 481, Sec. 173, revised from Sec. 93 of the Railroad Law of 1905, C. 565, S. 93, as amended, Law 1901 C. 49 S. 1), we will find that the clause of the former law which gave color to the opinion of the Appellate Division was completely changed in the revision.

Sec. 93 as it existed in 1893 (C. 434) required a bond

> "for the fulfilment of such agreement and for the commencement and completion of its railroad within the times hereinafter designated."

It authorized the local authorities in their discretion (Laws 1893, C. 434, Vol. I, p. 914) to

> "make their consent to depend upon any further conditions respecting other or further security or deposit suitable to secure the *construction,* completion and operation of the railroad *within any time not exceeding* the period prescribed in this article * * *."

And Sec. 99, with the caption "Within what time road to be built" provided that the rights "may be forfeited" if construction not commenced in one year after the necessary consents and not completed within three years after the consents, but with provision for extension within the discretion of a Court (these receivership proceedings are legal proceedings in a Court).

While this law by its terms appears to concern only cities of 1,250,000 inhabitants, the Court in the *Dusenberry* case, appears to have regarded it as the source of the authority of the Highway Commissioner in the town of Eastchester in the County of Westchester (see *South Shore Tr. Co.* vs. *Town of Brookhaven,* 116 App. Div. at p. 752). However that may be, the law was substantially changed from its condition in 1893 by the Revision of 1910, C. 481, where the former Section 93 became Section 173, for, instead of a bond for completion

> "within the times hereinafter designated"

the bond required by the section as revised (McKinney's Railroad Law of New York p. 185) is

> "for the fulfillment of such agreement and for the *commencement* and *completion* of its railroad *within the time designated by law* and for the performance of such *additional* conditions as the local authorities in their discretion may prescribe."

The provisions of the former law respecting the imposition of further conditions by the local authorities respecting other or further security or deposit to secure construction, completion and operation of the railroad

> "within *any* time not exceeding the period prescribed in this article" are continued.

It might well be argued that this relates to security only, and not to forfeiture. It might also be argued that it is obvious that this condition is not to extend to *ipso facto* forfeiture, because the same section both in 1893 and in 1910 authorizes the Board of Sinking Fund Commissioners of any City to compromise or release any obligation or liability to the Mayor, Aldermen and Commonalty under this Chapter.

But however this may be, this particular statute was in said revision of 1910 *made wholly inapplicable* to New York City, because it provides expressly:

> "Nothing herein contained shall apply to or affect any grant *hereafter* made under the provisions of title one, chapter three of Chapter three hundred and seventy-eight of the laws of eighteen hundred and ninety-seven and the amendments thereto known as the Greater New York Charter."

Since the contract and grant in the present case was made in 1912 and modified in 1913, and under these provisions of the Greater New York Charter, the whole argument based upon Section 93 of the former railroad law, which was the basis of the argument and specific statutory construction in the *Dusenberry* case (*supra*, p. 58) utterly fails.

Moreover, that was the construction of a particular power under a specific statute; and it

is only useful in combatting the City's position that the forfeiture clause was self-operative. Title one, Chapter three of Chapter 378 of the Laws of 1897 and its amendments (Revision of 1901, C. 460) contains Sections 71 to 77 of the New York City Charter relating to the grant of franchises under which the Board of Estimate and Apportionment makes its claim of its present power.

It expressly provides, S. 77.

> "Section ninety-three of Chapter five hundred and sixty-five of the laws of eighteen hundred and ninety and any acts amendatory thereof or supplemental thereto shall have *no* application to grants made under and pursuant to this title."

Therefore, by the most express statutory enactment the laws which the *Dusenberry* case construed is *not* to be applicable to this present franchise.

But Section 179 of the Railroad Law prescribing within what time a road is to be built, and prescribing the method of forfeiture and expressly empowering a *Court* to extend it *is* applicable to this franchise and within the City of New York.

In *Village of Bronxville* vs. *New York, Westchester & Connecticut Traction Co.*, 46 App. Div. 627 (2d decision) the Court (Appellate Division, 2d Department), though it appears to have decided the matter (1st decision) upon the basis of its conclusion in the *Dusenberry* case against the same defendant (*supra*, p. 58), in denying a motion for reargument and for leave to appeal to the Court of Appeals said:

> "It would be very desirable to have the question of the legality of the condition imposed by the highway authorities decided by the court of last resort; and we would certify

> the case to that court were it not that our disposition of the appeal also proceeded on a matter of fact."

The other cases cited by the City under this point as following and approving the *Dusenberry* case are not applicable to the present circumstances, especially as it seems obvious that Sec. 179 of the Railroad Law contemplates and provides for a Court proceeding to ascertain forfeiture.

Gaedeke vs. *Staten Island Midland R. R. Co.*, 43 App. Div. 514, concerned a passenger's right to maintain an action against a railroad company to recover an additional fare charged him in contravention of its agreement with a Highway Commission. It said (pp. 527-528)

> "Where an act provided the conditions upon which the consent could be granted, it is probable that others might not be added."

It pointed out that Section 93 of the Railroad Law (shown above not to be applicable here) required the consent to provide for but one fare, though it did not regard that provision as controlling.

Farnsworth vs. *Boro Oil & Gas Co.*, 216 N. Y. 40 concerned the estoppel of a Gas Company to question the conditions as to rates under which it occupied a highway with the consent of a town board. It involves the construction of other statute laws of New York; it characterizes the specific statutes, relating to Gas Companies as a tangle. It held that the specific conditions were not unlawful. An examination of the facts of the case (p. 44) show that they supplied the Court with grounds for estoppel. But assuredly this decision has no controlling or even illustrative force in

ascertaining the powers of the Board of Estimate and Apportionment of New York City under the railroad law of the State and the railroad provisions of the City Charter. It concerned the uses of a highway actually occupied under a consent, not the effect of failing to occupy a highway upon demand. All that was held was that a corporation actually occupying a highway by virtue of a consent given by a town board could not maintain that the consent was void.

The Court said (p. 47):

> "The precise limits of the estoppel under such conditions, we need not now consider."

There were two dissenting judges. Under these circumstances we submit that the decision has no controlling force in construing the powers of an entirely different board under an entirely different law.

South Shore Traction Co. vs. *Town of Brookhaven,* 116 App. Div., 749, concerned the right of one licensee to restrain another from the use of a highway outside of New York City; it was held that the consent never became operative. The decision was based upon a construction of Sec. 93 of the Railroad Law, which we have shown is expressly inapplicable in the City of New York.

The Court found it unnecessary to consider whether the provision for forfeiture was self-operative (p. 753).

People ex rel Frontier Electric Ry. Co. vs. *City of North Tonawanda,* 70 Misc. 91 was a refusal to issue a writ of mandamus to compel a consent in North Tonawanda. Much of the opinion is obviously tentative; the condition was regarded as a tentative offer by the City, and the Court held that it could not by mandamus turn it into an assent without its conditions.

The argument of the opinion is based in part (p. 93) upon Sec. 173 of the Railroad Law, which we have shown (*supra*, pp. 62, 63) has no application in New York City.

The affirmance in 143 App. Div. 955 was without opinion.

As we are dealing with specific powers and their effect under New York statutes, it seems unnecessary to discuss decisions (cited in the City's Brief) on the right to reënter land peacefully for breach of condition subsequent in a deed, nor what constitutes such re-entry nor the remedy for breach.

Munro vs. *Syracuse &c. Co.*, 200 N. Y. 224.
Schlesinger vs. *Kansas City &c. Ry. Co.*, 152 U. S. 444.
Rannels vs. *Rowe*, 145 Fed. Rep. 296.
Oregon R. R. &c. Co. vs. *McDonald*, 32 L. R. A. (N. S.) 117; 112 Pac. 413.

nor decisions (cited in the City's Brief) construing specific acts of Congress respecting public laws.

United States vs. *Van Horn*, 197 Fed. Rep. 611, 616.
United States vs. *Oregon &c. Co.*, 186 Fed. Rep. 861.

Though in the latter case it is said at p. 933:

> "The real question, as has been previously indicated, is whether any forfeiture has been incurred for breach of condition subsequent, and that is for judicial cognizance and for judicial inquiry and determination"

and again

> "In the present case the judicial inquiry simply precedes the act of re-entry or forfeiture, and its cardinal purpose is to determine the fact of forfeiture"

and again

> "and the facts being such that equity may entertain jurisdiction of the cause, there remains no reason why it should not be maintained."

It thus becomes apparent that the City's contention that the franchise was automatically forfeited has no support in the law or the decisions.

4.

THE RECEIVERS WERE ENTITLED TO RELIEF IN EQUITY.

We have shown (*supra*, p. 55) that Section 179 of the Railroad Law is applicable; that forfeiture is not automatic; that resort to a court is contemplated by that law; and

that a court is empowered to extend the time ~~performance~~

> "if the performance of any act required by this chapter or any prior acts within the times *therein* prescribed is hindered, delayed or prevented by legal proceedings in any court"
> • • •
> "or if the performance of any act required by the said statutes *within* the times *therein* prescribed is hindered, delayed or prevented by works of public improvement, or from *any other or different cause*, not within the control of the corporation upon which such requirement is imposed, the time for the performance of such act is *hereby* and shall

be deemed to be extended for the period covered by such hindrance, delay or prevention."

A Court might extend for a period of delay by legal proceedings; *the law* effected an automatic extension for the period of any delay due to a cause beyond the railroad company's control.

The "times" prescribed by the Chapter were one year from the necessary consents, to commence, and three years, to complete; the forfeiture prescribed was of the *extension* (Section 179, Railroad Law, City's Brief, p. 194).

The Receiver's petition showed that for causes not within the control of the Company, commencement and completion of the extension were hindered, delayed or prevented.

On November 15, 1917 an injunction was issued in this cause against the Traction Corporation (Transcript, p. 78); and it was continued December 26, 1917 (*ibid*, p. 79) and still remains in force. After that injunction the Traction Corporation could not proceed, whatever the Receivers might do; and that date was within one year after March 4, 1917 when the Traction Corporation was required to proceed by the Board's resolution of February 9, 1917 (Receiver's Petition, Transcript, p. 9).

There was then no default under the law; the Board was not empowered to defy the law; the Traction Company was not estopped, for it never accepted the Board's construction of the conditions for forfeiture; it had fulfilled the conditions of the forfeiture clause, on which the Board relied; and the Receiver showed, not only that the City had not complied with conditions precedent to require the extension, but that causes beyond their

control hindered, delayed and prevented construction, namely (Transcript, p. 15)

> "it was physically impossible for the Traction Corporation to comply with that resolution by August 23, 1917, even though it had had the money with which to make said extension, or could procure the same, owing to the fact that it could not get the steel rails which it had ordered for that purpose."

and

> "the project is not one which could or should be financed at this time when *all* construction work that will not *help the prosecution of the war* is being deferred."

It is to be borne in mind that these arbitrary requirements of the Board were coincident with the early days of the war. It had not been declared in February 1917 when they took their initial step, but when they were enjoined, June 15, 1918 and August 24, 1918, the United States was at *war*.

This Court should take judicial notice of what that entailed; and moreover the Receiver's petition alleges what it entailed.

The Receivers showed in their petition (Transcript, p. 18) that they were unable to determine the course to pursue and they ought to have a reasonable time to determine.

A more fit occasion for the extension which the Railroad Law itself authorized could not be imagined.

It was within the bounds of judicial discretion for the District Court to act as it did; any other course would have been improvident, and inconsistent with the express purpose and provisions of the Railroad Law.

III.

The judgment of the Circuit Court of Appeals should be vacated and the appeal to that Court dismissed.

Or, if this Court shall hold that the Circuit Court of Appeals had jurisdiction, its judgment should be reversed, and the decree of the District Court affirmed.

Respectfully submitted,

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